United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

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Court of Appeals, District of Columbia

OCTOBER TERM, 1905.

No. 1579.

374

FREDERICK S. YOUNG, CARRIE M. YOUNG, AND CHARLES O. YOUNG, HEIRS-AT-LAW OF THOMAS E. YOUNG, DECEASED, APPELLANTS,

vs.

THE NORRIS PETERS COMPANY.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

FILED JULY 5, 1905.

COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

OCTOBER TERM, 1905.

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In the Court of Appeals of the District of Columbia.

FREDERICK S. YOUNG ET AL., Appellants,
vs.
THE NORRIS PETERS COMPANY. } No. 1579.

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a Supreme Court of the District of Columbia.

FREDERICK S. YOUNG, CARRIE M. YOUNG, and Charles O. Young, Heirs-at-law of Thomas E. Young, Deceased, Plaintiffs,
vs.
THE NORRIS PETERS COMPANY, a Corporation, Defendant. } No. 43560. At Law.

UNITED STATES OF AMERICA, *District of Columbia,* } *ss:*

Be it remembered, that in the supreme court of the District of Columbia, at the city of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had, in the above-entitled cause, to wit:—

1 *Declaration in Ejectment.*

Filed December 21, 1899.

In the Supreme Court of the District of Columbia.

THOMAS E. YOUNG
vs.
THE NORRIS PETERS COMPANY, a Corporation. } At Law. No. 43560.

The plaintiff, Thomas E. Young, sues the defendant, The Norris Peters Company, a corporation duly organized under the laws of the State of Virginia, and having its principal office in the District of Columbia, to recover possession of one undivided fourth part of and in all that certain piece or parcel of land, messuage and appurtenances, situate, lying and being in the city of Washington, in the said District, and known as and being lot numbered thirty-four (34) in "Reservation B" in said city and District, beginning for the same on the south side of Pennsylvania avenue, west, at a point seventy-five (75) feet westwardly from the northeast corner of the

said reservation; thence southwardly, in a line perpendicular to the said avenue, one hundred and twenty-seven feet, five inches, (127′ 5″); thence westwardly in a line parallel to the said avenue, twenty-five feet (25′); thence northwardly, in a line perpendicular to said avenue, one hundred and twenty-seven feet, five inches (127′ 5″) to the northerly boundary of said reservation B; thence with the said boundary eastwardly, twenty-five feet (25′) to the place of beginning; of which land and premises the plaintiff claims, as aforesaid, an undivided one-fourth part, in fee simple, of which the plaintiff was heretofore lawfully possessed, to wit,
2 on the twentieth day of October, A. D. 1892, when the defendant entered the same and unlawfully ejected the plaintiff therefrom; and the plaintiff claims the possession of the said undivided one fourth part of the said land and premises, and of the improvements thereon, and the appurtenances, thereof, besides the costs of this suit.

And the plaintiff further sues the defendant for money payable by the defendant to the plaintiff, for that the defendant, having as aforesaid ejected the plaintiff from the aforesaid premises, has, from the day and date aforesaid, taken and received, and still continues to take and receive, the rents issues and profits thereof, and to use, occupy and enjoy the said premises to the damage of the plaintiff three thousand dollars, which amount the plaintiff claims, besides the costs of this suit.

ANDREW A. LIPSCOMB,
PHILIP WALKER,
Attorneys for the Plaintiff.

The defendant is to plead hereto on or before the twentieth day, exclusive of Sundays and legal holidays, occur-ing after the day of service hereof; otherwise judgment.

ANDREW A. LIPSCOMB,
PHILIP WALKER,
Attorneys for Plaintiff.

3 *Defendant's Plea.*

Filed January 13, 1900.

In the Supreme Court of the District of Columbia.

THOMAS E. YOUNG
vs.
THE NORRIS PETERS COMPANY, a Corporation. } No. 43560. At Law.

The defendant for plea to the declaration of the plaintiff filed herein says that it is not guilty in manner and form as said plaintiff in his declaration has alleged.

B. KENNON PETER,
Attorney for Defendant.

Memoranda.

November 19, 1903.—Death of plaintiff suggested.

December 11, 1903.—Frederick S. Young, Carrie M. Young, and Charles O. Young, sole heirs at law of Thomas E. Young, deceased made plaintiffs.

4 *Amended Declaration.*

Filed May 1, 1905.

In the Supreme Court of the District of Columbia.

THOMAS E. YOUNG
vs.
NORRIS PETERS COMPANY, a Corporation. } At Law. No. 43560.

The substituted plaintiffs by leave of the court first had and obtained file this amended declaration as follows:

First count. The substituted plaintiffs Frederick S. Young, Carrie M. Young, and Charles O. Young, sue the defendant to recover possession of the undivided one third part of lot numbered thirty-four in reservation B, in the city of Washington in the District of Columbia.

Beginning for the same on the south side of Pennsylvania avenue seventy-five feet westwardly from the northeast corner of said reservation B and running thence southwardly in a line perpendicular to said avenue one hundred and twenty-seven feet and five inches, thence westwardly in a line parallel to said avenue, twenty-five feet thence northwardly in a line perpendicular to said avenue, one hundred and twenty-seven feet and five inches to the northerly boundary of said reservation B, and thence with said boundary, eastwardly twenty-five feet to the place of beginning of an undivided one-third part of which lot the plaintiffs' ancestor Thomas E. Young was lawfully possessed on, to wit, October 20,1892, when the defendant who is in actual occupation of the said lot and premises, entered upon the same and therefrom unlawfully ejected the said Thomas E. Young, and unlawfully detained the same from said
5 Thomas E. Young in his life time until he died on the 6th day of October, 1903.

And the said defendant unlawfully detained and still detains the same from the substituted plaintiffs who are the sole heirs at law of said Thomas E. Young.

And the substituted plaintiffs claim possession of the said undivided one-third part of said described lot in which they claim an estate in fee simple, together with the costs of this suit.

Second count. The substituted plaintiffs further sue the defendant for that the defendant heretofore to wit, on the 20th day of October, 1892 unlawfully entered said premises described in the first count

of this declaration, of an undivided one-third interest in which said Thomas E. Young was owner and of which since his death which occurred on the 6th day of October, 1903, the substituted plaintiffs who are his sole heirs at law, have been the owners in fee simple.

And the said defendant kept and continued to keep said Thomas E. Young in his life time and after his death, the substituted plaintiffs ejected and expelled from said undivided interest in said described lot and premises.

And the said defendant has, since the 20th day of October, 1892, received all the rents, issues, and profits of said lot to-wit, of the value of thirteen thousand dollars, for the whole rental value thereof.

Whereby said Thomas E. Young in his life time and said substituted plaintiffs since his death, have lost the said rents, issues, and profits of great value to wit, of the value of forty-three hundred and thirty-three dollars and thirty-three cents for the undivided interest aforesaid.

6 And the said substituted plaintiffs sue the defendant to recover the aforesaid share of said rents, issues and profits to which the said Thomas E. Young was entitled during his life time and to which they have been entitled since his death.

And the substituted plaintiffs claim under this count the sum of forty-three hundred and thirty-three dollars, and thirty-three cents and costs of this suit.

R. G. DONALDSON,
JOHN RIDOUT,
Attorneys for Plaintiffs.

7 *Plea to Amended Declaration.*

Filed May 1, 1905.

In the Supreme Court of the District of Columbia.

THOMAS E. YOUNG, Pl't'ff,
vs.
THE NORRIS PETERS Co., Def't. } No. 43560. At Law.

The defendant for plea to the amended declaration and to each count thereof of the substituted plaintiffs filed herein says that it is not guilty in manner and form as said substituted plaintiffs in *his* amended declaration *has* alleged.

R. ROSS PERRY AND SON,
BARNARD & JOHNSON,
Attorneys for Plaintiff-.

Additional Pleas of Limitation.

Filed May 1, 1905.

In the Supreme Court of the District of Columbia.

FREDERICK S. YOUNG ET AL.
vs.
THE NORRIS PETERS COMPANY. } No. 43560. Law.

Now comes the defendant and by leave of the court first had and obtained files the following additional pleas to the second
8 counts of the original and amended declarations herein and says—

2. For plea to the second counts of said declarations the defendant avers it is not guilty of the trespasses alleged in said second counts within three years prior to the bringing of this suit.

3. The defendant for further plea to the said second counts of said declarations avers that no action has accrued to the plaintiffs within three years next before the bringing of this suit.

* * * * * * *

BARNARD & JOHNSON,
R. ROSS PERRY,
Att'ys for Defendant.

Joinder in Issue.

Filed May 1, 1905.

In the Supreme Court of the District of Columbia.

THOMAS E. YOUNG
vs.
THE NORRIS PETERS COMPANY. } At Law. No. 43560.

The substituted plaintiffs join issue on the defendant's 1st plea to the amended declaration.

R. G. DONALDSON,
JOHN RIDOUT,
Attorneys for Plaintiffs.

9 *Plaintiff's Joinder of Issue.*

Filed May 1, 1905.

In the Supreme Court of the District of Columbia.

THOMAS E. YOUNG
vs.
NORRIS PETERS CO. } 43560. Law.

The substituted plaintiffs hereby join issue on the defendant's second and third pleas to the second count of the amended declaration.

COLE & DONALDSON,
JOHN RIDOUT,
Attorneys for Pl't'ffs.

Memorandum.

May 2, 1905.—Verdict for defendant.

10 *Judgment.*

Supreme Court of the District of Columbia.

WEDNESDAY, *May* 10*th*, 1905.

Session resumed pursuant to adjournment, Hon. Harry M. Clabaugh, chief justice, presiding.

THOMAS E. YOUNG, Plaintiff,
vs.
NORRIS PETERS COMPANY, a Corporation, Defendant. } No. 43560. At Law.

It appearing to the court that the time within which to file a motion for a trial herein has, under the rule expired, judgment on verdict is ordered: Thereupon, it is considered and adjudged that the plaintiff take nothing herein by this action; that the defendant go hereof without day and recover of plaintiffs its costs of defense to be taxed by the clerk, and have execution thereof, against the plaintiffs Frederick S. Young, Carrie M. Young and Charles O. Young.

Order for Appeal.

Filed May 15, 1905.

In the Supreme Court of the District of Columbia, the 15th Day of May, 1905.

FREDERICK S. YOUNG, CARRIE M. YOUNG, Charles O. Young, Heirs at Law of Thomas E. Young,
vs.
NORRIS PETERS COMPANY.
} At Law. No. 43560.

11 The clerk of said court will enter an appeal by the substituted plaintiffs from the judgment herein and issue citation on behalf of said substituted plaintiffs as appellants against said Norris Peters Company.

R. G. DONALDSON,
JNO. RIDOUT,
Attorneys for Pl't'ffs.

12 In the Supreme Court of the District of Columbia.

FREDERICK S. YOUNG, CARRIE M. YOUNG, and Charles O. Young, Heirs at Law of Thomas E. Young, Deceased,
vs.
THE NORRIS PETERS COMPANY.
} At Law. No. 43560.

The President of the United States to the Norris Peters Company, Greeting:

You are hereby cited and admonished to be and appear at a Court of Appeals of the District of Columbia, upon the docketing the cause therein, under and as directed by the rules of said court, pursuant to an appeal filed in the clerk's office of the supreme court of the District of Columbia, on the 15th day of May, 1905, wherein Frederick S. Young, Carrie M. Young, and Charles O. Young heirs at law of Thomas E. Young, deceased, are appellants, and you are appellee, to show cause, if any there be, why the judgment rendered against the said appellant, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Harry M. Clabaugh, chief justice of the supreme court of the District of Columbia, this 15th day of May in the year of our Lord one thousand nine hundred and five.

[Seal Supreme Court of the District of Columbia.]

JOHN R. YOUNG, *Clerk.*

Service of the above citation accepted this 25th day of May, 1905.

R. ROSS PERRY AND SON,
Attorneys for Appellee.

[Endorsed:] 11. No. 43560 Law. Frederick S. Young *et al.* *vs.* The Norris Peters Company. Citation. Issued May 15 1905 *190–*. Served cop- of the within citation on —— ——. —— ——, marshal. Cole & Donaldson John Ridout, attorneys for appellants.

13 *Memorandum.*

May 23, 1905.—Appeal bond filed.

Supreme Court of the District of Columbia.

TUESDAY, *May* 23*d*, 1905.

Session resumed pursuant to adjournment, Hon. Harry M. Clabaugh, chief justice, presiding.

* * * * * * *

THOMAS YOUNG ET AL., Plaintiffs,
vs.
NORRIS PETERS COMPANY, Defendant. } No. 43560. At Law.

Comes now the plaintiffs herein by their attorneys, and presenting to the court the bill of exceptions taken at the trial of this cause, and pray that the same be signed and made of record *nunc pro tunc*, which is accordingly done.

14 *Bill of Exceptions.*

Filed May 23, 1905.

In the Supreme Court of the District of Columbia.

THOMAS E. YOUNG
vs.
NORRIS PETERS COMPANY. } At Law. No. 43560.

Be it remembered:

That this action came on for trial before Mr. Chief Justice Clabaugh and a jury.

Whereupon the substituted plaintiffs, Frederick S. Young, Carrie M. Young and Charles O. Young, to maintain the issues on their part joined gave in evidence two stipulations as follows:

"In the Supreme Court of the District of Columbia.

"THOMAS E. YOUNG
"*vs.*
"NORRIS PETERS COMPANY. } At Law. No. 43560.

"In this cause it is stipulated by counsel as follows:

"That James E. Young died October 19, 1892, in the District of Columbia seized in fee of the *locus in quo* described in the declaration in this cause, leaving as his only heirs at law Thomas E. Young, William A. Young, John M. Young, brothers, and Margaret L. Gaddis, a sister.

"It is further stipulated and agreed that upon any trial of this action the depositions and testimony of all witnesses now de-
15 ceased or beyond the District of Columbia who testified upon the trial of issues respecting the will of James E. Young being cause numbered 36227 at law in this court, as such depositions and testimony were stenographically reported at said trial may be read in evidence, as respective counsel may be advised, with the same force and effect as if said testimony was given at said trial by living witnesses produced upon the witness stand; counsel shall have the right to call any witness instead of reading his deposition.

"It is further stipulated that the cost of the stenographic work of the approaching trial of this action to be made by a stenographer mutually selected shall be borne in equal shares by plaintiffs and defendant.

"COLE & DONALDSON,
"JOHN RIDOUT, *For Plaintiff.*
"BARNARD & JOHNSON,
"R. ROSS PERRY AND SON,
For Def't.

"April 13, 1905.

In the above entitled cause it is further stipulated by counsel as follows:

"Upon the trial of this action the plaintiffs will offer no evidence attacking in any way the testamentary capacity of James E. Young at the time he is alleged to have executed and published his last will and testament, dated October 1, 1892, and admitted to probate and record in the supreme court of the District of Columbia, sitting as a probate court, on the 15th day of November 1895, nor of John M. Young at the time he is alleged to have executed and published his last will and testament, dated June 29, 1894, and admitted to probate and record in the supreme court of the District of Columbia,
16 sitting as a probate court, on the 15th day of November, 1895; and the defendant shall only be required to make formal proof of said execution by such subscribing witnesses to said wills or either of them as are living and within the District of Columbia at the time

of trial; further, no evidence shall be offered by the plaintiffs attacking the said wills or either of them by reason of any alleged undue influence, fraud or other similar matter mentioned in any caveat heretofore filed to the said wills or either of them; that the gross annual rents from the *locus in quo* are $1200 per annum and have been such since the filing of the declaration in this cause; that the substituted plaintiffs, Frederick S. Young, Carrie M. Young, and Charles O. Young, are the children and the sole heirs at law of Thomas E. Young, deceased, the original plaintiff.

"Provided however, that nothing hereinbefore contained shall prevent the plaintiffs from objecting to any proof of said wills or either of them on the ground that the only competent proof of the execution of said wills or either of them is a probate of the same as a will or wills of real estate by the supreme court of said District holding a probate court, said probate made after July 1, 1898.

"R. GOLDEN DONALDSON,
"JOHN RIDOUT,
Attorneys for Plaintiff.
"R. ROSS PERRY AND SON,
"BARNARD & JOHNSON,
"*Attorneys for Defendant.*

"April 29, 1905."

Thereupon the counsel for the defendant admitted that the defendant as tenant of Job Barnard, surviving trustee under the will
17 of John M. Young, was at the institution of this suit, and still is in possession of the *locus in quo*, and that the net rental value thereof was $75. per month.

That James E. Young died October 19, 1892 and John M. Young, February 5, 1895.

Thereupon the substituted plaintiffs gave evidence tending to prove that the whole title to the *locus in quo* is of the value of seventeen thousand dollars.

And thereupon the substituted plaintiffs rested.

Thereupon the defendant offered evidence tending to prove the deaths respectively of James T. Young, one of the witnesses to the will of James E. Young, and of Reuben F. Baker, one of the witnesses to the will of John M. Young, which deaths were admitted by the plaintiffs, but counsel for plaintiffs objected to the competency of such evidence on the ground that it was immaterial and incompetent as part of the proof of said wills, but the court overruled the objection and admitted the evidence to which ruling counsel for plaintiffs excepted.

Counsel for plaintiffs agreed that George J. Mueller, one of the witnesses to the will of John M. Young, and who was present in court and who was ill, need not be called, and that he would testify as had the other witnesses to said will, it being agreed by counsel

on both sides that such consent should be without prejudice to plaintiffs' contentions as hereinafter set forth in respect to the method of proving the said wills.

Thereupon the defendant called as a witness, GEORGE F. HANE and asked him the following question:

"Will you look at this paper I now show you, purporting to be the will of the late James E. Young, and say whether or not
18 that is your signature to it? To which question counsel for plaintiff- objected on the ground that the exclusive forum for the admission of said paper as a will of realty, is the supreme court of the District of Columbia, holding a probate court, and that the only competent proof of such execution is such probate of such paper after June 8, 1898.

It was agreed between counsel that this objection should apply to all questions asked of and answered by the witness concerning the execution of said will.

But the court over-ruled said objection and admitted said testimony, to which ruling counsel for the plaintiff- excepted.

The witness thereupon gave evidence tending to prove the due execution of said paper as a will of realty.

Counsel for defendant then called as a witness, EDWARD H. WILSON, and propounded to him the same question as that propounded to the witness Hane, whereupon counsel for plaintiff- objected, to said question on the same grounds as are hereinbefore set forth in respect to the witness Hane, and the same agreement was made as to the other testimony of said witness concerning said will. But the court over-ruled said objections and admitted said testimony, to which ruling counsel for plaintiffs excepted.

Thereupon the witness gave evidence tending to prove the due execution of said paper as a will of realty.

Thereupon counsel for defendant offered said paper in evidence as to the last will and testament of James E. Young as a will of realty, to which counsel for plaintiff- objected on the same grounds hereinbefore set forth in respect of the testimony of the witnesses Hane and Wilson and on the further ground that said paper
19 was irrelevant because it devised to John M. Young only a life estate, and that said John M. Young had died before action brought. But the court overruled said objection and permitted the paper to be read to the jury.

It is as follows:

"I, James E. Young, being of sound mind and memory but weak of body, do make and declare this to be my last will and testament.

"I give, will, bequeath and devise to my sister, Margaret L. Gaddis, in her own right, that certain piece or parcel of land, known and designated as number fifteen hundred and seven (1507), Ninth (9th) street, northwest, in the city of Washington, District of Columbia, together with all the improvements upon said land.

"I give, will, bequeath and devise to my brother William A. Young, the farm now owned by me, and which I have occupied as my residence, situate on the Columbia road, in Alexandria county, State of Virginia, said farm being the more easterly one of the two farms now owned by me in said county and State.

"I give, will and bequeath and devise to my brother John M. Young, that certain piece or parcel of land known and designated as number four hundred and fifty-six (456) Pennsylvania avenue, northwest, in the city of Washington, District of Columbia, together with all the improvements thereon or appertaining to said piece or parcel of land.

"I give, will, bequeath and devise to my said brother John M. Young the most westerly farm of the two farms owned by me and situate on the Columbia road in Alexandria county, State of Virginia.

20 "I give, will, bequeath and devise to my said brother John M. Young all of the personal property of which I may die seized and possessed as well also of any other property or properties not otherwise willed and devised as hereinbefore set forth.

"I nominate and appoint my said brother John M. Young as executor of this my last will and testament.

"In testimony whereof, I have hereunto set my hand and seal, and publish and decree this to be my last will and testament in presence of the witnesses below, this first day of October, in the year of our Lord, one thousand eight hundred and ninety-two.

his
JAMES E. x YOUNG. [L. S.]
mark.

"Signed, sealed, declared and published by the above named testator, James E. Young, as and for his last will and testament in the presence of us, who, at his request and in his presence and in the presence of each of us, have hereto signed our names as witnesses.

"EDWARD H. WILSON,
"423 *2nd N. E.*
"GEORGE F. HANE,
"JAMES T. YOUNG,
"1336 *N. Y. Ave.*"

Counsel for defendant then offered in evidence the probate of said paper as a testament of personalty by the supreme court of the District of Columbia holding a special term for orphans' court business, dated the 15th day of November, 1895, to which counsel
21 for plaintiff- objected on the same grounds as are hereinbefore set forth in respect of the will, but the court over-ruled the objection and permitted said probate to be read in evidence. The said probate is in the usual form.

Counsel for defendant then called as a witness to the paper purporting to be the will of John M. Young, BENJAMIN F. QUEEN, where-

upon counsel for plaintiff- objected to any such testimony by the witness on the grounds hereinbefore set forth, in respect of the witnesses to the will of James E. Young, but the court over-ruled the objection and admitted said evidence, to which ruling counsel for plaintiffs excepted. Whereupon the witness gave evidence tending to prove the due execution of said paper as a will of realty.

Counsel for defendant then offered said paper in evidence as a will of realty to which counsel for plaintiff- objected on the grounds that the exclusive forum for probate of wills of realty was the supreme court of the District of Columbia holding a probate court and that the only competent proof of the execution of said paper as a will of realty is the probate thereof after June 8, 1898 by said last mentioned court. But the court over-ruled said objection and admitted the paper in evidence, whereupon it was read to the jury. It devises the residue of testator's estate which included the *locus in quo* set forth in the declaration herein, in fee simple to certain trustees and their survivor, of whom it was agreed Job Barnard is sole survivor, upon certain trusts.

It was admitted by counsel on both sides that defendant
22 was at time of action brought and still is tenant of said Barnard, sole surviving trustee.

It was further proved by the defendant, and also admitted by counsel for the plaintiff-, that that piece or parcel of land known and designated as number four hundred and fifty-six (456) Pennsylvania avenue, northwest, in the city of Washington, District of Columbia, mentioned in the will of James E. Young, is identical with the *locus in quo* mentioned in the said declaration, and covers the whole of the said *locus in quo*.

Counsel for defendant then offered in evidence the probate of said paper last mentioned, as a testament of personalty by the supreme court of the District of Columbia, holding a special term for orphans' court business, to which counsel for plaintiffs objected on the same grounds as are hereinbefore stated, in respect of the probate as to personalty of the paper purporting to be James E. Young's will, but the court over-ruled said objection and admitted said probate in evidence to which ruling counsel for plaintiff- excepted; the probate was then read in evidence to the jury. It is in the usual form and bears date the 15th day of November, 1895.

Thereupon the defendant rested.

The foregoing was all the evidence in the cause.

Thereupon counsel for plaintiffs, upon all the evidence in the case, prayed the court to instruct the jury as follows:

Prayers.

1. The jury are instructed that upon all the evidence in
23 this action, the substituted plaintiffs are entitled to recover, under the first count of the amended declaration one-third

"I give, will, bequeath and devise to my brother William A. Young, the farm now owned by me, and which I have occupied as my residence, situate on the Columbia road, in Alexandria county, State of Virginia, said farm being the more easterly one of the two farms now owned by me in said county and State.

"I give, will and bequeath and devise to my brother John M. Young, that certain piece or parcel of land known and designated as number four hundred and fifty-six (456) Pennsylvania avenue, northwest, in the city of Washington, District of Columbia, together with all the improvements thereon or appertaining to said piece or parcel of land.

"I give, will, bequeath and devise to my said brother John M. Young the most westerly farm of the two farms owned by me and situate on the Columbia road in Alexandria county, State of Virginia.

20 "I give, will, bequeath and devise to my said brother John M. Young all of the personal property of which I may die seized and possessed as well also of any other property or properties not otherwise willed and devised as hereinbefore set forth.

"I nominate and appoint my said brother John M. Young as executor of this my last will and testament.

"In testimony whereof, I have hereunto set my hand and seal, and publish and decree this to be my last will and testament in presence of the witnesses below, this first day of October, in the year of our Lord, one thousand eight hundred and ninety-two.

his
JAMES E. x YOUNG. [L. S.]
mark.

"Signed, sealed, declared and published by the above named testator, James E. Young, as and for his last will and testament in the presence of us, who, at his request and in his presence and in the presence of each of us, have hereto signed our names as witnesses.

"EDWARD H. WILSON,
"423 2*nd* *N. E.*
"GEORGE F. HANE,
"JAMES T. YOUNG,
"1336 *N. Y. Ave.*"

Counsel for defendant then offered in evidence the probate of said paper as a testament of personalty by the supreme court of the District of Columbia holding a special term for orphans' court business, dated the 15th day of November, 1895, to which counsel
21 for plaintiff- objected on the same grounds as are hereinbefore set forth in respect of the will, but the court over-ruled the objection and permitted said probate to be read in evidence. The said probate is in the usual form.

Counsel for defendant then called as a witness to the paper purporting to be the will of John M. Young, BENJAMIN F. QUEEN, where-

upon counsel for plaintiff- objected to any such testimony by the witness on the grounds hereinbefore set forth, in respect of the witnesses to the will of James E. Young, but the court over-ruled the objection and admitted said evidence, to which ruling counsel for plaintiffs excepted. Whereupon the witness gave evidence tending to prove the due execution of said paper as a will of realty.

Counsel for defendant then offered said paper in evidence as a will of realty to which counsel for plaintiff- objected on the grounds that the exclusive forum for probate of wills of realty was the supreme court of the District of Columbia holding a probate court and that the only competent proof of the execution of said paper as a will of realty is the probate thereof after June 8, 1898 by said last mentioned court. But the court over-ruled said objection and admitted the paper in evidence, whereupon it was read to the jury. It devises the residue of testator's estate which included the *locus in quo* set forth in the declaration herein, in fee simple to certain trustees and their survivor, of whom it was agreed Job Barnard is sole survivor, upon certain trusts.

It was admitted by counsel on both sides that defendant
22 was at time of action brought and still is tenant of said Barnard, sole surviving trustee.

It was further proved by the defendant, and also admitted by counsel for the plaintiff-, that that piece or parcel of land known and designated as number four hundred and fifty-six (456) Pennsylvania avenue, northwest, in the city of Washington, District of Columbia, mentioned in the will of James E. Young, is identical with the *locus in quo* mentioned in the said declaration, and covers the whole of the said *locus in quo*.

Counsel for defendant then offered in evidence the probate of said paper last mentioned, as a testament of personalty by the supreme court of the District of Columbia, holding a special term for orphans' court business, to which counsel for plaintiffs objected on the same grounds as are hereinbefore stated, in respect of the probate as to personalty of the paper purporting to be James E. Young's will, but the court over-ruled said objection and admitted said probate in evidence to which ruling counsel for plaintiff- excepted; the probate was then read in evidence to the jury. It is in the usual form and bears date the 15th day of November, 1895.

Thereupon the defendant rested.

The foregoing was all the evidence in the cause.

Thereupon counsel for plaintiffs, upon all the evidence in the case, prayed the court to instruct the jury as follows:

Prayers.

1. The jury are instructed that upon all the evidence in
23 this action, the substituted plaintiffs are entitled to recover, under the first count of the amended declaration one-third

undivided interest in the real estate described in said count, and for such sum as mesne profits under the second count of the amended declaration as from all the evidence in this action they shall find to be a reasonable allowance for one-third of such mesne profits, and in computing such one-third of the mesne profits they may calculate the sum from the twentieth day of October, 1892, the date of the ouster alleged in the declaration.

2. The jury are instructed that upon all the evidence in this action the substituted plaintiffs are entitled to recover, under the first count of the amended declaration, one-third undivided interest in the real estate described in said count, and for such sum as mesne profits under the second count of the amended declaration as from all the evidence in this action they shall find to be a reasonable allowance for one-third of such mesne profits; and in computing such mesne profits, they shall calculate the same from the sixth day of October, 1903, the date of the death of Thomas E. Youug, the ancestor of the substituted plaintiffs.

3. The jury are instructed upon all the evidence in this action the substituted paintiffs are entitled to recover, under the first count of the amended declaration, one-fourth undivided interest in the real estate described in said count, and for such sum as mesne profits under the second count of the amended declaration as from all the evidence in this action they shall find to be a reasonable allowance for one-fourth of such mesne profits; and in computing such
24 mesne profits they shall calculate the same from the sixth day of October, 1903, the date of the death of Thomas E. Young, the ancestor of the substituted plaintiffs.

To each of which instructions counsel for defendant objected and the court sustained each of said objections and refused to give any of said instructions, to which ruling counsel for plaintiffs in respect of each prayer severally and separately excepted. None of said instructions was read to the jury.

Counsel for defendant announced that he did not desire to ask any instruction.

Whereupon the court of his own motion, instructed the jury that there being no conflict in the testimony which had been admitted, they would be justified in finding a verdict for the defendant, to which instruction counsel for plaintiff- objected and duly excepted.

Thereupon the jury rendered a verdict in favor of the defendant.

Each of the aforesaid exceptions was duly and separately reserved before the jury retired to consider of their verdict and each of them was duly separately and severally noted by the justice presiding upon his minutes before the said jury retired.

And the plaintiffs now pray the court to settle and sign this, their bill of exceptions in order that the same may be made part of the record in this action and the same is accordingly done this 23rd. day of May, 1905, now for then.

HARRY M. CLABAUGH,
Chief Justice.

25 *Designation for Transcript.*

Filed May 27, 1905.

In the Supreme Court of the District of Columbia.

FREDERICK S. YOUNG, CARRIE M. YOUNG, Charles O. Young, Heirs at Law of Thomas E. Young,
vs.
THE NORRIS PETERS COMPANY.
} At Law. No. 43560.

In preparing transcript of record on appeal therein the clerk will include the following:

1. Dec. 11, 1903—mem. order of substitution of plaintiffs.
1½. Original declaration and pleas hereto.
2. Amended declaration.
3. Pleas 1, 2, 3 to amended declaration.
4. Mem. Joinder.
5. Jury sworn and respited.
6. Verdict for defendant—mem.
7. Judgment.
8. Appeal—mem.
9. Citation.
10. Bond fixed.
11. Bond filed.

26 12. Bill of exceptions settled.
13. Bill of exceptions.

R. G. DONALDSON,
JNO. RIDOUT,
For Plaintiffs.

27 Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA, *District of Columbia,* } *ss:*

I, John R. Young, clerk of the supreme court of the District of Columbia, hereby certify the foregoing pages, numbered from 1 to 26, inclusive, to be a true and correct transcript of the record, as per directions of counsel herein filed, copy of which is made part of this transcript, in cause No. 43560, at law, wherein Frederick S. Young *et al.* are plaintiffs, and The Norris Peters Company, a corporation, is defendant, as the same remains upon the files and of record in said court.

Seal Supreme Court of the District of Columbia.

In testimony whereof, I hereunto subscribe my name and affix the seal of said court, at the city of Washington, in said District, this 3rd day of July, A. D. 1905.

JOHN R. YOUNG, *Clerk.*

Endorsed on cover: District of Columbia supreme court. No. 1579. Frederick S. Young *et al.*, appellants, *vs.* The Norris Peters Company. Court of Appeals, District of Columbia. Filed Jul- 5, 1905. Henry W. Hodges, clerk.

IN THE

Court of Appeals, District of Columbia.

OCTOBER TERM, 1905.

No. 1579.

Frederick S. Young, Carrie M. Young, and Charles O. Young, Heirs-at-Law of Thomas E. Young, Deceased, Appellants,

vs.

The Norris Peters Company.

BRIEF FOR APPELLANTS.

COLE & DONALDSON,
JOHN RIDOUT,
B. W. PARKER,
Attorneys for Appellants.

JUDD & DETWEILER, (INC.) PRINTERS, WASHINGTON, D. C.

Court of Appeals, District of Columbia.

OCTOBER TERM, 1905.

No. 1579.

FREDERICK S. YOUNG, CARRIE M. YOUNG AND CHARLES O. YOUNG, HEIRS-AT-LAW OF THOMAS E. YOUNG, DECEASED, APPELLANTS,

vs.

THE NORRIS PETERS COMPANY.

STATEMENT OF THE CASE.

This is an action of ejectment to recover one-third undivided interest in lot 34, Reservation B, in the City of Washington, District of Columbia, of which James E. Young died seized.

He left one sister and three brothers, one of whom, Thomas E. Young, brought the suit.

He died before trial, and his heirs-at-law, the appellants, were substituted for him, and filed the amended declaration (Rec., p. 3) on which the case was tried.

Said James E. Young left a paper writing purporting

to be his last will and testament, whereby in respect of said ~~will~~ he devised as follows:

> "I give, will and devise to my brother, John M. Young, that piece or parcel of land known and designated as No. 456 Pennsylvania avenue, northwest, in the City of Washington, District of Columbia, with all the improvements thereon or appertaining to said piece or parcel of land."

Said paper writing also contains the following:

> "I give, will, bequeath and devise to my said brother, John M. Young, all of the personal property of which I may die seized and possessed, as well also of any other property or properties not otherwise willed and devised, as hereinbefore set forth."

Said paper writing also contained a clause as follows:

> "I give, will, bequeath, and devise to my sister, Margaret L. Gaddis, in her own right, that certain piece or parcel of land, known and designated as No. 1507 Ninth street N. W., in the city of Washington, District of Columbia, together with the improvements on said land."

Said John M. Young died February 5, 1895, leaving a paper writing dated June 28, 1894, purporting to be his last will and testament, whereby he devised the said lot in fee to certain trustees, of whom Job Barnard is survivor, and defendant is in possession as his lessee.

Before the original declaration was filed, John M. Young, the alleged devisee of James E. Young, as to the *locus in quo*, had died as above stated, and so the amended declaration claims an undivided one-third in-

terest, the theory of the declaration being that both James E. Young and John M. Young died intestate.

The Court below, over the objection and exception of appellants, instructed the jury in favor of the defendant.

There was a verdict and judgment for defendant, from which appellants appealed.

Assignment of Errors.

The Court below erred as follows:

First: In permitting the subscribing witnesses to the alleged wills of James E. Young and John M. Young to testify in respect to the execution thereof.

Second: In admitting in evidence the probates of said alleged wills in the Supreme Court of the District, holding a special term for Orphans' Court business.

Third: In overruling defendant's objection to the admissibility of the alleged will of James E. Young, on the ground that by said will only a life estate was devised to said John M. Young, and that he being dead, the said alleged will was immaterial.

Fourth: In refusing to grant plaintiff's first prayer which is set out on pages 13 and 14 of the record.

Fifth: In refusing to grant plaintiff's second prayer which is set out on page 14 of the record.

Sixth: In refusing to grant plaintiff's third prayer which is set out on page 14 of the record.

Seventh: In instructing the jury of his own motion to find a verdict in favor of the defendant.

Argument.

From the foregoing statement and assignment of errors it will appear that there are but three questions in this record. They are:

First: May the will of a testator who died in 1892, which will was ~~admitted~~ to be probated in the Supreme Court of the District of Columbia, holding a Probate Court, in 1895, be proved since June 8, 1898, by the subscribing witnesses in an action of ejectment tried after that date?

Second: Is the probate of a will in the Supreme Court of said District, holding a Special Term for Orphans' Court Business, in 1895, admissible to prove the due execution of such a will as to realty?

Third: Did the devise to John M. Young in James E. Young's will create a fee or life estate?

The answers to the first two questions depend on the construction of the Wills Act, approved June 8, 1898, and which now appears, so far as is material to this controversy, in Sections 117, 140, 141 and 144 of the Code.

The relevant sections of the Code are printed as an appendix to this brief.

Prior to the enactment of the Act of June 8, 1898 the said Probate Court had no jurisdiction to admit to probate wills of realty.

Darby *v.* Mayer, 10 Wheaton, 465.
Campbell *v.* Porter, 162 U. S., 478.

To remedy this defect, the Act of June 8, 1898, was passed.

Its manifest purpose was to make the Probate Court the exclusive forum for the probate of wills. Under such legislation the jurisdiction is exclusive.

Broderick Will Case, 21 Wallace, 503. (See p. 515).

Section 8 of the Act (which is section 141 of the Code), provides for just such a case as is presented on this record, and demonstrates the legislative intent that after the passage of the Act no other court should have jurisdiction to establish wills.

It follows that there was no competent proof in the case of the execution of the wills, and so no foundation for a general instruction by the Court in favor of the defendant.

The third question depends upon the construction of James E. Young's will.

It is well settled in this jurisdiction that a devise in a will published prior to June 8, 1898, in the language contained in the first devise to John M. Young in James E. Young's will created only a life estate.

The said will will be found set out in full on pages 11 and 12 of the record.

The language of the devise is as follows:

> "I give, will, bequeath and devise to my brother John M. Young, that certain piece or parcel of land known and designated as No. 456 Pennsylvania avenue N. W., in the City of Washington, District of Columbia, together with all the improvements thereon, or pertaining to said piece or parcel of land."

The rule in Schneider vs McAleer is fully and unanswerable supported in:

Wright vs Denn ex dem Page
10 Wheat. 204

from which it also appears that a fee is not devised by such language as is used in James E. Young's residuary devise.

The question of the construction of wills in this regard was settled very early in the history of this Court.

Schneider *v.* McAleer, 2 App., D. C., 461.

Is the omission of words of inheritance in the devise to John M. Young supplied by the concluding clause, which is as follows?

> "I give, will, bequeath and devise to my said brother John M. Young, all of the personal property of which I may die seized and possessed as well also of any other property or properties not otherwise willed and devised as hereinbefore set forth."

It is submitted that it is not, for two reasons:

a. To hold that this residuary devise carried the remainder in fee after the life estate created by the first devise, would cut down the devise to Mrs. Gaddis to a life estate.

b. The language used negatives the idea that the testator intended to devise any property or properties theretofore mentioned, but only to deal with such, if any, as he had before alluded to.

This leaves the devise of the *locus in quo* to be considered as if there was no other allusion to John M. Young in the will.

It follows that if the first two assignments of error are well taken, defendant's first and second prayers should have been granted, and if they are not well taken, and that the third assignment is, then defendant's first prayer should have been granted.

Upon either theory the judgment below was wrong and should be reversed.

The question involving the application of the Act of June 8, 1898, and of sections 117, 141 and 144 of the Code to wills which became operative prior to June 8, 1898, is one of very great importance, and is entitled to, and will undoubtedly receive, the careful consideration of the Court.

The question of the construction of this will, while not of such general importance, is nevertheless of very great importance to these litigants.

In conclusion, it is respectfully submitted that the judgment below should be reversed and a new trial granted.

COLE & DONALDSON,
JNO. RIDOUT,
B. W. PARKER,
Attorneys for Appellants.

Appendix to Appellants' Brief.

For convenience, the language of the relevant sections of the Act of June 8, 1898, and of the Code are given below:

ACT OF JUNE 8, 1898.

SEC. 2. That in addition to the jurisdiction conferred in the preceding section of this act plenary jurisdiction is hereby given to the said court, holding the said special term, to hear and determine all questions relating to the execution and to the validity of any and all wills devising any real estate within the District of Columbia, and of any and all wills and testaments properly presented for probate therein, and to admit the same to probate and record in said special term, and neither the execution nor the validity of any such will or testament so admitted to probate and record shall be impeached or examined collaterally, but the same shall be in all respects and as to all persons *res judicata*, subject, nevertheless, to the provisions hereinafter contained.

SEC. 8. That the foregoing sections of this act shall apply only to wills and testaments hereafter offered for probate, and in cases of intestacy to the estates of such persons as shall die after the passage of the act: Provided, that in the Supreme Court of the District of Columbia, holding a special term for Orphans' Court business, any person interested in the probate of any such will may offer the same for probate as a will of real estate, whereby such proceedings shall be had as by this act are authorized in regard to wills hereafter offered for probate.

SEC. 117. That in addition to the jurisdiction conferred in the preceding section, plenary jurisdiction is hereby given to the said court holding the said special term to hear and determine all questions relating to the execution and to the validity of any and all wills devising any real estate within the District of Columbia, and of any and all wills and testaments properly presented for probate therein, and to admit the same to probate and record in said special term; and neither the execution nor the validity of any such will or testament so admitted to probate and record shall be impeached or examined collaterally, but the same shall be in all respects and as to all persons *res judicata*, subject, nevertheless, to the provisions hereinafter contained.

SEC. 140. Whenever any caveat shall be filed issues shall be framed under the direction of the Court for trial by jury: Provided, That in all cases in which all persons interested are *sui juris*, and before the Court the issues may be tried and determined by the Court, without a jury, upon the written consent of all such parties. If they are to be tried by a jury, they shall be triable in said Probate Court; and at least ten days prior to the time of trial all the heirs at law and next of kin of the decedent, or both together, as the case may require, and all persons claiming under the will shall be each served with a copy of said issues and a notification of the time and place of the trial thereof. If any one of them be an infant, or of unsound mind he shall have a guardian *ad litem* appointed for him by the Court before such trial shall proceed. If, as to any party in interest, the notification shall be returned "Not to

be found," the Court shall assign a new day for such trial, and shall order publication, at least twice a week, for a period of not less than four weeks, of a copy of the issues and notification of trial, in some newspaper of general circulation in the District, and may order such further publication as the case may require. And the Supreme Court of the District of Columbia may, from time to time, prescribe and revise rules and regulations for service personally upon such party outside of the District of Columbia of a copy of such issues and notification. Personal service on absent parties shall not be essential to the jurisdiction of the Court. Before the time of trial the justice holding said Court shall direct twenty-four jurors to be drawn for service in said Court, having the qualifications prescribed by law, in the manner provided by law for the drawing of jurors to serve in the Circuit Court. The proceeding for impaneling a jury for the trial of said issues shall be the same as if they were being tried in the said Circuit Court. In all cases in which such issues shall be tried the verdict of the jury and the judgment of the Court thereupon shall, subject to proceedings in error and to such revision as the common law provides, be *res judicata* as to all persons; nor shall the validity of such judgment be impeached or examined collaterally. When a jury is sworn for such trial the other jurors who have been summoned, but not sworn for such trial, shall be discharged and their names returned to the jury box. Any jury so sworn may also be employed in the trial of other issues pending in said Court not relating to wills, and also, if the parties interested shall consent, in the trial of issues relating to wills other than those for the trial of which they were

specifically summoned. Any jury summoned for service in any of the circuit or criminal courts of the District may, with the concurrence of the justice presiding in said Court, be used for the trial of issues in the Probate Court.

SEC. 141. That the foregoing sections shall not apply to wills and testaments offered for probate prior to the eighth day of June, *anno Domini* eighteen hundred and ninety-eight, and in cases of intestacy shall apply only to the estates of such persons as shall have died after said date and shall hereafter die: Provided, That any person interested under any will filed in the office of the register of wills for the District of Columbia prior to said date may offer the same for probate as a will of real estate, whereupon such proceedings shall be had as by this Code are authorized in regard to wills offered for probate after said date.

SEC. 144. The said Court shall have authority to issue commissions to take the testimony on non-resident witnesses, and such depositions, as well as depositions *de bene esse*, taken according to law, may be read at the trial of any issue in said Court. On the trial of any such issue exceptions may be taken to the rulings of the Court, and the said Court may set aside the verdict and grant a new trial for the same causes and in the same manner as in case of a trial in the Circuit Court. Unless the same be reversed, any final order or decree admitting a will to probate shall be conclusive evidence of the validity of such will in any collateral proceeding in which such will may be brought into question, and a transcript of the record of such will, and of the decree admitting the same to probate, shall be sufficient proof thereof.